SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 92

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

vs.

E. A. HILL,
Respondent

BRIEF OF RESPONDENT E. A. HILL IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

The petition, labeled a petition for writ of certiorari, is an oddity. It is doubtful whether a document like it has ever before been filed in the Supreme Court of the United States. It is misnamed. It is a petition filed May 27, 1950, for a *rehearing* of a case decided February 14, 1949. It is filed at the October, 1949, term, near its close in May, 1950, for *rehearing* of a case decided in the middle of the October, 1948, term of the court.

It was not filed within fifteen days after the judgment was rendered on February 14, 1949, as required by Rule of Court No. 33, but a year and three and a half months thereafter. It was filed after the October, 1948, Term had adjourned *sine die;* after the mandate had been sent down to the Supreme Court of North Carolina; after that court had en-

tered judgment on April 1, 1949, reversing its judgment of September 22, 1948; and had ordered a new trial; after the new trial had been had in the trial court in September, 1949; after the railroad had appealed to the Supreme Court of North Carolina; after that court had decided on March 1, 1950, that the decision of the Supreme Court of the United States rendered February 14, 1949, was the law the case, and that there was no error in the trial; and after eighty-six of the ninety days allowed for filing a petition for writ of certiorari in this Court had elapsed.

It does not contain the statement required by Rule 33 for a petition to rehear, that the petition is filed in good faith and not for delay. Yet it *is a petition to rehear.* Respondent Hill was terribly injured in the service of the railroad on December 5, 1945. He brought this action November 13, 1946. On March 1, 1950, the Supreme Court of his state found no error in the second trial awarding him damages (231 N. C. 499). This decision could not be effective for issuance of execution in the trial court until it was certified down on the first Monday in April, 1950. On the twenty-ninth day of March, 1950, the railroad obtained from the Supreme Court of North Carolina a stay of execution, in order that it might file a petition for writ of *certiorari.* It waited until two days before its ninety days' filing time expired and then filed, not a petition for writ of *certiorari,* but a petition for a *rehearing* of the decision of February 14, 1949. The filing occurs just before the court will rise for the term, thus postponing decision on the petition until the October Term, 1950. That will be just short of five long years since Mr. Hill was injured, and four years since he brought action. The railroad's complaisance with respect to the long delay is indicated by the title page of its petition. It is headed "——— Term 1950," not October Term 1949, which was still in session when the petition was filed on May 27, 1950.

That the railroad's request is for a rehearing of the February 14, 1949 judgment of the Supreme Court of the United States rather than a review of the judgment of the Supreme Court of North Carolina of March 1, 1950, is apparent at a glance. Of this, more later. That this is the true characterization of the document is demonstrated by its utter futility as a petition for a writ of *certiorari*, to review the North Carolina judgment of March 1, 1950. The petition does not even suggest that the evidence before this Court now is any different from that here in February, 1949. It *complains that the North Carolina court obeyed the mandate and judgment of this Court!!* And yet, the North Carolina Court was bound to obey. Mr. Justice Reed said exactly that in *Insurance Group Committee* v. *Denver & Rio Grande Western Railroad Company*, decided 3 February 1947, 329 U. S. 607, 612; 91 L. Ed. 547 at page 550:

> When matters are decided by an appellate court, its rulings, unless reversed by it or a superior court, bind the lower court. Thus a cause proceeds to final determination.

The only error alleged in the North Carolina judgment of March 1, 1950, is that there was not sufficient evidence of negligence to warrant a verdict for the plaintiff, and that this Court should have nonsuited the case. That court did just that in September, 1948, and this Court reversed February 14, 1949. There was no petition to rehear in this Court, and the mandate issued in due course, the plaintiff recovered a verdict, the North Carolina court, as it was required to do by this Court's judgment, found that there was no error in refusing to nonsuit the case, on the same evidence that had been before this Court. Now the railroad asks that this Court again reverse the North Carolina court because it obeyed the mandate of this Court!

Consider the predicament the North Carolina courts would find themselves in, if this Court should again reverse the North Carolina Supreme Court. The granting of a writ of certiorari would at least open up that possibility The The State court decided the case September 22, 1948; it was reversed February 14, 1949; it required a new trial in the Superior Court before a jury; it considered the railroad's appeal and followed the directions of the court of last resort; and then would find itself again reversed, that it was right the first time, and the State of North Carolina had been put to a great amount of expense to march up the hill and down again. Such procedure would bring chaos into the judicial system over which the Supreme Court of the United States is placed at the head for the very purpose of bringing order out of chaos.

This is the sort of disorder that the court had in mind when it wrote:

> While power rests in a Federal Court that passes an order or decision to change its position on a subsequent review in the same cause, *orderly judicial action,* except in unusual circumstances, requires it to refuse to permit the relitigation of matters or issues previously determined on a former review.

Mr. Justice Reed in *Insurance Group Committee* v. *Denver and Rio Grande Western Railroad Company,* decided February 3, 1947, 329 U. S. 607, 612; 91 L. Ed. 547, 550.

So the respondent respectfully submits that the railroad did not really intend to request this Court to find any error in the judgment of March 1, 1950, rendered below. If so, it should be denied.

What the railroad really intended to request by its petition was that this Court find error in its own judgment Feb-

ruary 14, 1949. Petitioner says exactly that on page four of its petition:

> The present petitioner now respectfully submits that the decision of *this court* in Hill v. Railroad 336 U. S. 911 (this is the judgment of February 14, 1949) was mistakenly predicated upon a theory which was not involved in the controversy, and that that decision is, therefore, not the law of the case.

That is a *petition to rehear,* which comes too late and in improper form, under Rule 33, and should be denied.

The textbook definition of a petition for a rehearing fits this petition like a glove.

> A petition for a rehearing is a request to the court to revise its own action by correcting errors and modifying or setting aside its own judgment. Its object is to point out mistakes of law or fact or both which it is claimed the court made in reaching its conclusions.

3 American Jurisprudence, 345, "Appeal and Error", No. 795.

And what is the mistake of law or fact which petitioner claims the court made in reaching its conclusion? It is that the Chief Justice and all eight associate Justices were "misled by plaintiff's brief," (petition page 4), "apparently upon the strength of plaintiff's assertion, concluded that the North Carolina court had considered assumption of risk" (brief, page 14). The petition requests in effect that this Court write an opinion that each of its nine members was "misled" into a misconception of the import of the record in a simple negligence action under F. E. L. A. by the shrewdness or adroitness or the skill of little country lawyers who at the time they filed Hill's petition in December, 1948, had not even been admitted to the bar of this Court. Aside from the fantastic nature of the request,

it is addressed solely and exclusively to the function of a *petition to rehear* the judgment of this Court of February 14, 1949. It has no place in a petition for a writ of certiorari to the Supreme Court of North Carolina, to review that court's judgment of March 1, 1950. It is not contended that respondent's lawyers "misled" the state court. It is in effect contended that *this Court* misled *that court.*

The real question to be decided on this petition is not that stated in the petition, page 3, but this:

Will this Court entertain a petition to rehear *its own judgment* which is filed without complying in any way with Rule 33 on Rehearings, when it is filed *in form only* of a petition for writ of certiorari to a *lower court?*

The whole thesis of the petition and supporting brief is specious. The question presented in Hill's petition, No. 472, October Term, 1948, *E. A. Hill* v. *Atlantic Coast Line Railroad Company,* at page 6, was "whether . . . there was sufficient evidence of negligence on the part of the carrier for the case to be submitted to the jury."

There was nothing shrewd, adroit, or slick, about that question.

Petitioner (respondent here) argued in his brief, page 13:

"Petitioner's evidence of respondent's negligence warranted submission of the case to the jury."

That was a fair summary of his argument on pages 13, 14, 15, 16, 17 of his brief. Petitioner expressed agreement with the North Carolina court that he had to show *negligence* sufficient in the opinion of the *court* to take his case to the jury (page 17), but he pointed out the evidence in the record which he successfully contended was sufficient.

In view of the holding by the state court in the opinion then under review (*Hill* v. *R. R.*, 229 N. C. 236, at page 237, R. P. 35) that "there is no evidence the workmen engaged

in throwing out cross-ties saw the plaintiff, *or had reason to anticipate his walking along near the track at the time,*" in connection with the abundant evidence that both Hill and the conductor walked back and forth from engine to caboose "a dozen or more times a day," plaintiff's counsel surmised that the state court must have been influenced by the common law doctrine of assumption of risk, including the risk of negligence of fellow employees. This was an argument that may have impressed this Court as a reasonable explanation of the state court's failure to give any significance to the evidence that Hill's presence in the area of danger could have been foreseen. Be that as it may, the holding of the state court that the evidence of *negligence* on the part of the railroad was insufficient was the question debated by both sides in their briefs, and the only question decided by this Court.

> The writ (of certiorari) will not issue where it appears that the same questions were previously submitted and adjudicated by a prior writ of certiorari to which the petitioner was a party.

State of New Jersey v. *Jersey City*, 30 N. J. Law 247.
14 C. J. S. 178 "Certiorari", Section 35.

Petitioner contends (Petition, page 2) that it "is yet to have a day in this court." The court reversed the lower court *per curiam* without further argument than opposing briefs. The decision was eight to one for granting the petition and nine to none to reverse the judgment under review. It was handed down February 14, 1949. The railroad had fifteen days, until March 1, 1949, to file a petition to rehear, and to ask for another "day in court," and to point out to the court that it had been fooled by some country lawyers, and make every contention now made in the

petition, good, bad, or indifferent. *It filed no petition to rehear.* It thereby deprived itself of its further "day in court" by its own inaction. It is now too late to file such a petition. That is what it is attempting to do. Realizing that it has forfeited its right to do so, it seeks to "mislead" the court into granting a *rehearing* a year and quarter too late, by labeling its petition one for "writ of certiorari."

The petition, whatever its name or nature, ought to be promptly denied, to put an end sometime to this litigation.

On December 5, 1945, plaintiff Hill, as was his custom in the performance of his duties, walked from engine toward caboose while his fellow servants were tumbling cross-ties over the side of a gondola car. He walked further away (eighteen feet) from the train than the ties customarily fell. He was in sight of the work crew. They threw one tie with unaccustomed force, three times its length, without giving Hill any warning of their intention to perform the operation in an unusual manner, and the tie struck Hill down. He was due a special warning. He was injured by the negligence of his follow servants, who by their unexpected act of negligence made unsafe his place to work. He was entitled to go to the jury on his case under *Tiller* v. *Atlantic Coast Line Railroad Company,* 323 U. S. 574, and numerous other cases cited in his brief in No. 472, October Term, 1948, and by virtue of the judgment *Hill* v. *Atlantic Coast Line Railroad Company,* 336 U. S. 911, 93 L. Ed. 1075. That is the law of this case.

Finally, Rule 38 (5) (a) provides that the court will not look with favor upon a petition for writ of certiorari to a state court, unless that court "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Here, the state court

has decided a federal question "theretofore determined by this court," and in a way exactly in accord with that determination on the identical facts.

Respectfully submitted,

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